Supreme Court, U.S.
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No. 97-1943

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, ET AL.,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR THE RESPONDENT

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 25.6, respondent United Air Lines, Inc., respectfully moves for leave to file the accompanying post-argument brief. This brief is necessary because during the oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591, immediately after the argument of this case, the Solicitor General for the first time took the position that an individual must show that he or she has an ***impairment*** to establish that he or she was "regarded [by an employer] as" substantially limited in a major life activity. That contention is directly contrary to an EEOC regulation, 29 C.F.R. § 1630.2(*l*)(3), that might escape the Court's attention but for the filing of this supplemental brief. United has never had the opportunity to respond to the Solicitor General's new contention, which bears as importantly on this case as it does on the *Albertsons* case. We submit that the accompanying post-argument brief would assist the Court in evaluating the Solicitor General's contention.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

Respectfully submitted.

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POST-ARGUMENT BRIEF FOR THE RESPONDENT

A central issue presented by this case is whether United's decision to require pilot applicants to have 20/100 or better vision means that it "regard[s] as" disabled all persons whom it rejects because they do not meet those standards. 42 U.S.C. § 12102(2)(C). United has argued that Congress did not intend to require employers to justify all adverse employment decisions based on the physical characteristics of individuals. An employer may use physical characteristics to distinguish one group of ***non-disabled*** people from another group of ***non-disabled*** people without doing that which the "regarded as" prong covers — that is, regarding people who do not have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" (*id.* § 12102(2)(A)) as if they ***did*** "hav[e] such an impairment" (*id.* § 12102(2)(C)).

During the April 28 oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591, one or more Justices expressed concern about an interpretation of the "regarded as" prong that would bring within the ADA's protected class ***every*** individual who was turned down for ***any*** job as the result of a physical characteristic. Counsel for both the respondent in that case and the Government were asked for examples of individuals who might be subject to ***unjustifiable*** employment decisions based on physical characteristics but nonetheless would ***not*** be covered by the statute. Assistant to the Solicitor General Edward C. DuMont stated that a person rejected from a job because he had blue eyes would not have a cause of action under the ADA. According to Mr. DuMont, such an individual would not be "regarded as" having a disability because having blue eyes is not an impairment. He contended further that an individual must have an impairment before he can complain that he was "regarded as" disabled by an employer that rejected him.

Mr. DuMont's contention, however, is directly contrary to the EEOC's regulation defining the statutory phrase "is regarded as having such an impairment." According to the regulation, that phrase means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such impairment; or

(3) ***Has none of the impairments described in paragraph (h)(1) or (2) of this subsection but is treated by a covered entity as having a substantially limiting impairment.***

29 C.F.R. § 1630.2(*l*) (emphasis added). Furthermore, Section 1630.2(*l*) is substantively identical to, among other regulations, 45 C.F.R. § 84.3(j)(2)(iv), a regulation issued by a federal agency pursuant to Title V of the Rehabilitation Act, and therefore ***must*** be followed in ADA cases. 42 U.S.C. § 12201(a); *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202, 2205 (1998) (following a different portion of 45 C.F.R. § 84.3(j)(2)). According to these regulations, a person need not actually have ***any*** impairment (either one that substantially limits a major life activity or one that does not) to claim that he has been subject to adverse employment action because an employer regards him as having a substantially limiting impairment.

The import of this regulation is clear: the "regarded as" prong is ***not*** limited to those who actually have impairments, and the suggested limitation will not in fact cabin the overly expansive interpretation advanced by the Solicitor General. If the Solicitor General is correct in his suggestion that an employer's use of any physical criterion is virtually conclusive proof that the employer regards people who do not meet that criterion as having a substantially limiting impairment, then an employer's use of blue eyes (or a quarterback's relatively short stature) as a reason not to hire a prospective employee will in every case require an employer to litigate over whether its physical criterion is justified. Whether or not such a statute might make sense, it is decidedly not (and counsel for Mr. Kirkingburg conceded that it is not) the statute that Congress enacted. Congress did not use the "regarded as" prong to do though the backdoor what it refused to do through the front: require an employer to justify every physical criterion it uses to screen job applicants.

This Court should recognize that the "regarded as" prong was intended to address the relatively rare situation in which an employer takes action against an individual because the employer

mistakenly believes that the individual has an impairment that substantially limits a major life activity. The employer's mistake may concern either the existence of the impairment or the degree to which the impairment limits the individual's major life activities, as the EEOC's regulation makes clear, but there must be some such mistake. The "regarded as" test was not intended to require employers to justify qualification standards that separate one group of non-disabled individuals from another.

A real-world example not only illustrates this point, but also shows that the Government does not apply to itself the pious theoretical construct that it enunciated at the oral arguments in both *Sutton* and *Albertsons*. As United observed in its brief (at 12), the United States Navy requires its pilots to have uncorrected visual acuity of 20/30 or better. No such standard applies to other positions within the Navy. In separating those who can be pilots from those who can hold other positions within the Navy, the Navy obviously is distinguishing one category of non-disabled persons from another, not distinguishing those it regards as non-disabled from those it regards as disabled (or as "substantially limit[ed] in one or more * * * major life activities," 42 U.S.C. § 12102(2)(A)). Yet the Solicitor General asked this Court to presume that employers in the private sector ***do*** regard as disabled anyone who cannot meet their vision standards for pilots.

The third prong of the ADA's disability definition was not intended to swallow the first prong, and subject to litigation every employer that makes an employment decision based on a physical characteristic (whether or not an impairment) that does not substantially limits a major life activity. To avoid that result, the "regarded as" prong must be read to apply only when employers reject individuals because they believe them to have ***substantially limiting*** impairments — not merely impairments that render them less than ideally suited, in the employer's view, for the job at issue.

The "regarded as" test did not originate with the ADA. It was part of the Rehabilitation Act for many years before passage of the ADA. See *Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) (quoting former 29 U.S.C. § 706(7)(B), now 29 U.S.C.A. § 705(20)(B)). Yet no appellate court has ***ever*** construed it to bring a nearsighted person within the protected class of "disabled" or "handicapped" individuals. This Court should not be the first.

Respectfully submitted.

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